No. 142.

Office Supreme Court, U.S.
FILED
NOV 30 1900
JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

OCTOBER TERM 1900.

Brief of Ward for Respondent.

Number 142.

Filed Nov. 30, 1900.

LIZZIE STEARNS BLEECKER AND
ELSIE L. BLEECKER,

*Libellants and Appellants,*

*vs.*

THE STEAMSHIP "KENSINGTON," HER ENGINES, ETC.

INTERNATIONAL NAVIGATION COMPANY,

*Claimant and Appellee.*

**Brief on behalf of the International Navigation Company, Claimant and Appellee.**

HENRY GALBRAITH WARD,
*Of Counsel for International Navigation Company,*
160 BROADWAY, NEW YORK.

# Supreme Court of the United States,

OCTOBER TERM, ~~1899.~~ 1900

No. ~~414.~~ 142

LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, Libellants and Appellants,

*vs.*

THE STEAMSHIP "KENSINGTON," her Engines, etc., INTERNATIONAL NAVIGATION COMPANY, Claimant and Appellee.

**BRIEF ON BEHALF OF THE INTERNATIONAL NAVIGATION COMPANY, Claimant and Appellee.**

The sole question before this Court in this case is whether a ticket for the transportation of the libellants on the British steamship "Kensington" from Antwerp, Belgium, to the port of New York, Claimant's Exhibit "A" (folios 201–219), is a contract or a mere voucher.

The libellants contend that the ticket is a voucher, while the claimant contends and the District Court and Circuit Court of Appeals held that it is a contract.

The ticket contains the following clause:

(*d*) "The ship-owner or agent shall not under any circumstances be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in

advance on the excess value at the rate of 1% or its equivalent, in which case the ship-owner shall only be responsible according to the terms of the ship-owner's form of cargo bill of lading, in use from the port of departure."

If the ticket is a contract this clause, printed on the face of it over the agent's signature, is binding upon the libellants.

If the ticket is a mere voucher, this clause is a notice or regulation not binding upon the libellants unless reasonable and actually or constructively brought to their notice.

## FIRST POINT.

**The First and Second Assignments of Error, being in general terms to the effect that the decree below is wrong and should be reversed, will not be considered separately, because the reasons upon which they depend are to be found in the specific assignments hereinafter discussed.**

## SECOND POINT.

**The Courts below were right in holding that the passage ticket in question was a contract; that the limitation of the amount of the carrier's liability contained in it was binding upon the libellants; that such a limitation is not against public policy; and that the ticket should be admitted in evidence (Third, Fourth, Fifth and Tenth Assignments of Error.)**

The Court will notice that both the District Judge before whom the ticket itself was in evidence and the Circuit Court of Appeals have found that the clause limiting the amount of the carrier's liability was printed on the face of the ticket over the signature of the agent in type which, though somewhat smaller than the preceding type, was perfectly clear and legible.

*Judge Brown*, of the District Court, said (at folio 232):

> "In the body of the ticket, under the head of 'Notice to Passengers,' it is stated as follows:
> 'It is a condition upon which this ticket is granted and is mutually agreed, for the consideration aforesaid, that' * * * Here follow ten paragraphs in type somewhat smaller than the preceding type, but perfectly clear and legible, stating numerous conditions."

*Judge Lacombe*, in the Circuit Court of Appeals, said (fol. 308):

> "The ticket, which is dated December 2, 1897, begins with a recital of the names of the passengers and numbers of staterooms and berths, and states that it 'is good for second cabin passage of the persons named in the margin * * * by the British steamship Kensington from Antwerp on the 11th of December * * * unless prevented from unforeseen circumstances, with 20 cubic feet of personal baggage for each adult passenger, free of charge, excess being charged for at the rate of 125 francs per cubic foot.' Immediately succeeding is the caption, 'Notice to Passengers,' and these words: 'It is a condition upon which this ticket is granted and it is mutually agreed for the consideration aforesaid, that—— Here, as the District Judge finds, follows ten paragraphs in type somewhat smaller than the preceding type, but perfectly clear and legible, stating numerous conditions."

This Court, in the case of the "*Majestic*," 166 U. S., p. 375, had under consideration a ticket of the White Star

Line, upon *the front* of which there was an agreement of transportation over the signature of the agent, and on the *back* of which there was a notice to passengers in seven different paragraphs, one of which was passed upon by the Court. This Court, in a most unmistakable way, held that what was printed on the face of the ticket over the signature of the agent was a contract; whereas, what was printed on the back of the ticket was a mere notice, and therefore not a part of the contract. The whole discussion of the claim by this Court was as a notice or regulation. The opinion begins with these words:

> "By *the contract* in this case the Steamship Company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held as matter of law that whether they were regulations for the conduct of business or limitations upon common law obligations they constituted any part of *the contract*."

The italics are ours.

Accordingly the provision relied upon by the claimant in this case should be taken to be a part of the contract, and therefore the question of its reasonableness, provided only that it is not against public policy, does not arise at all. It is sufficient that the parties have agreed to it.

That it is not against public policy has been decided by this Court after most careful consideration in the case of *Hart* vs. *Pennsylvania Railroad Company*, 112 U. S., 331, where it was held that though a common carrier cannot exempt himself from liability for negligence, yet he may fix a value upon the property carried and limit the amount of his liability to that value, especially if the rate of freight is made proportionate to the value. It resulted in that case that the shipper's offer to show that his actual loss was $25,000, whereas under the contract he was entitled

to receive but $1,200, was excluded. This is precisely the arrangement that is made in the clause now before the Court; the baggage is carried free provided it is valued at 250 francs. But if the passenger wishes it to be carried at a greater value, then he must pay freight at the rate of one per cent. on the excess value over 250 francs. Accordingly, this clause is not an exemption of the carrier from liability for his own negligence, and so against public policy, but is a means of fixing the amount of his liability and protecting him from exaggerated claims, which is quite consistent with public policy.

It must be admitted that the case of *Richardson, Spence & Co.* vs. *Rowntree*, 1894, Appeal Cases, 217, is not consistent with what we have said nor with the *ratio decidendi* in the case of the "*Majestic.*" It may fairly be described as at least an insufficiently considered case. The Law Lords decided it upon the strength of two prior decisions.

*Henderson* vs. *Stevenson*, H. L., 2 App. Cases, Sc., 470.

*Parker* vs. *Southeastern* R.R. Co., L. R. 1 C. P. D., 618, 2 C. P. D., 416.

The stipulations which were relied upon by the defendants in those cases were printed upon the back, in the one case upon a steamer ticket which had on it merely "Dublin to Whitehaven," and in the other on a receipt for luggage which was deposited in the luggage office of a railroad company. There was absolutely no ground for saying that what was printed on the face of either of these instruments was the contract between the parties, or that what was printed on the back was a part of what was printed on the face. The House of Lords seems to hold in the *Richardson* case that no instrument drawn by one man and given to another can be a contract unless its provisions have been called to the attention of the party who did not

prepare it. Of course, we know this is not so in the case of bills of lading and policies of insurance. Whether such an instrument is or is not a contract depends chiefly upon its terms. It is true that most railroad tickets and some steamship tickets, as in the *Henderson* case, are mere vouchers. A ticket for ocean transportation, however, is a much more important document; it is a transaction into which people enter with care, and no Transatlantic steamship ticket, as far as we know, is drawn as a voucher. In the ticket now under consideration, above the signature of the agent are contained all the provisions applicable to the transportation, and in its very last clause it is described as a contract. This was the view taken of the ticket of the Cunard Steamship Company in the case of *Fonseca* vs. *The Steamship Co.*, 153 Mass., 553, and by the Court of Appeals of the State of New York in a ticket of a company which was the predecessor of the carrier now before this Court. *Steers* vs. *The Liverpool & N. Y. SS. Co.*, 57 N. Y., 1. Unless some fraud or deception or concealment is practiced the party accepting such a document is bound by its terms.

It will be observed that the *Richardson* case involved a claim for personal injuries as to which the amount of the company's liability was restricted to $100. Personal injuries may be anything—from a slight, painless bruise to a painful permanent disability, and neither party could possibly foretell what injury was going to be sustained; whereas the passenger could tell exactly what the value of his baggage was and arrange to have it carried at that value. And the ticket contained no provision, as in the clause now under consideration, whereby upon payment of a greater sum the company's liability for permanent injuries could be proportionately increased.

The condition of the law on this point in England is certainly in an unsatisfactory state. *Sir Frederick Pol-*

*lock*, in the 6th edition (August, 1894,) of his work on the Law on Contracts, speaking of the law of England, and citing among other cases *Richardson* vs. *Rowntree*, says:

> "The result, as it stands at present, appears to be that it is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to contract only on special terms. A person who, knowing this, enters into the contract, is then deemed to assent to the special terms; but this again is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt."

In the *Fonseca* case, *supra*, the Court said, *inter alia*:

> "The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. (Rice *vs.* Dwight Mfg. Co., 2 Cush., 80; Grace *vs.* Adams, 100 Mass., 505; Hoadley *vs.* North Trans. Co., 115 Mass., 304; Monitor Ins. Co. *vs.* Buffum, 115 Mass., 343; Germania Ins. Co. *vs.* Memphis R.R., 72 N. Y., 90.) This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. (Grace *vs.* Adams, 100 Mass., 505; B. & M. R.R. *vs.* Chipman, 146 Mass., 107; Parker *vs.* S. E. R.R., 2 C. P. D., 416, 428; Harris *vs.* Great West R.R., 1 Q. B. D., 515; York Co. *vs.* Central R.R., 3 Wall., 107; Hill *vs.* Syracuse R.R., 73 N. Y., 351.) The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. (Brown *vs.* E. R.R., 11

Cush., 97; Malone *vs.* Boston R.R., 12 Gray, 388; Henderson *vs.* Stevenson, L. R. 2, H. L. Sc., 470; Quimby *vs.* Vanderbilt, 17 N. Y., 306; R.R. *vs.* Stevens, 95 U. S., 655.) Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the 'contract ticket' was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so he would be expected to read it, and if he failed to do so he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages and bore the signature of the defendant company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff was immaterial. (*Quimby* vs. *Boston & Maine R.R.*, 150 Mass., 365 and cases there cited.) It contained elaborate provisions in regard to the rights of the passengers on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day in the week. No one who could read could glance on it without seeing that it undertook expressly to prescribe the particulars which would govern the conduct of the parties until the passenger reached the port of destination. In that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why the consignor who is bound by the provisions of a bill of lading which he accepts without reading should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger."

And the Court of Appeals of New York in the *Steers* case, *supra*, said:

"In the case of *Belger* vs. *Dinsmore* (51 N. Y., 166), it was decided that in the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting the common law liability of common carriers, contained in a receipt given by them for freight, were known and assented to by the party receiving it. In that case the decision in *Blossom* vs. *Dodd* (43 N. Y., 264) was examined and shown to be entirely consistent with the conclusion arrived at. I do not perceive any distinction growing out of the fact, that in the case before us the subject was the transportation of a passenger and her baggage, which can render the decision inapplicable. The plaintiff, by her agent, was an applicant for a passage to Europe by the defendant's ship, the voyage to be commenced at a future day, and received on payment of the price a written engagement from the defendant expressing its undertaking. A printed *fac-simile* of this paper is before us, and although part of it is in smaller type than the rest, no part of it is in such type as to suggest to the mind the idea of concealment as the possible motive for its being thus printed. It is all printed on one side of the paper, and all the printed matter precedes the signature of the agent of the defendant. That the plaintiff herself never read the paper is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted himself with the terms of the engagement which the defendant assented to. Looking to the course of business, the Court may take notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract, when he supposes himself only to be taking a token indicative of his right. The paper in evidence ought, therefore, to be regarded as having received the mutual assent of the parties, and as be-

ing, as its language purports, their contract touching the voyage in question."

This ticket belongs to a class of unilateral contracts of which there are many in use, viz.: Bills of lading, blanks for telegraph messages and policies of insurance. We can conceive no reason why the holder of either of these documents is bound without reading or knowing its provisions when he took it; and yet the holder of a ticket for transportation across the ocean is not. In truth the transaction of business would be greatly embarrassed by such a ruling, because the carrier, though offering a contract in its nature reasonable, would find that his rights depended upon whether the purchaser of the contract was literate or illiterate, or was a foreigner who could not understand the language; and would be greatly exposed to unconscientious claims, because he never could prove that the holder had read, or if he had read had understood, the provisions of the contract. Must the carrier print for the foreigner in his own language or translate the English to him, read to the uneducated, and, when all is done, be at the risk of being misunderstood?

There is no conflict between the law as laid down by the Circuit Court of Appeals and the law as laid down in the courts of the State of New York on this subject.

The *Steers* case, *supra*, was cited with approval by the Court of Appeals in the case of *Zimmer* vs. *The New York Central and Hudson River Railroad Co.*, 137 N. Y., at p. 463, where Gray, *J.*, speaking of a live-stock contract which valued a horse at one hundred dollars, said:

> "In this case the contract did not exempt the company from liability for the negligence which, as we must assume, occasioned the loss of the horse. That occurred through none of the causes particularly specified in the contract, and nothing precluded the plaintiff from recovering upon the negligence proven; but the amount of his recovery was limited by the

contract to the amount of one hundred dollars. That the plaintiff did not know of the terms of this contract, is of no consequence. Coolidge was his agent, and will be presumed to have known and to have assented to the stipulation in the contract, which limited the general liability of the carrier. *Belger* vs. *Dinsmore*, 51 N. Y., 166; *Steers* vs. *Steamship Co.*, 57 *id.*, 1."

The case of *Glovinsky* vs. *The Cunard Steamship Co.*, 4 N. Y. Misc. Rep., 266, is an opinion of the General Term of the City Court of New York, a court whose jurisdiction is restricted to claims not amounting to more than two thousand dollars, and which it is presumed could not have intended to overrule the Court of Appeals. The case is very badly reported. There is nothing to show whether the clause which was under discussion was on the face or the back of the ticket, whether it was a part of the contract, or a pure and simple notice. Upon appeal to the General Term of the Court of Common Pleas, 6 Misc., 388, the case was affirmed upon an entirely different ground, viz., that the parties had made an independent parol contract in no way connected with the contract of transportation contained in the ticket.

## THIRD POINT.

**The Courts below were right in holding that the clause in the contract of transportation limiting the amount of the carrier's liability applied to the Steamship Kensington, which was the carrier's property. (Sixth and Seventh Assignments of Error.)**

No one who reads this clause can be in any doubt that it was intended to apply to the shipowner and his prop-

erty as well. The agent is separately mentioned because, having signed the contract, he might be personally liable. It is not to be inferred from this that it was intended to leave the shipowner's property liable. No doubt, contracts can be made whereby a man is relieved from liability, and yet all his property, or a particular piece of his property, subjected to it; but precise and unmistakable language would be required to produce so singular a result. To read the clause of the contract in this way would not be to construe it, but to nullify it. An exemption of the shipowner would be perfectly valueless if his vessel is subjected for the same claim to a maritime lien. A lien arises in the case of a maritime contract only as an incident of personal liability of the contractor, and if his personal liability be released, it stands to reason that the lien is. Could it, for instance, be contended that if these passengers had executed a release to the Steamship Company, for a valuable consideration, without mentioning the steamship, that they could then prosecute the same claim against the vessel? When the parties have agreed that for any particular claim the contractor shall not be liable, obviously his property cannot be liable for it. The whole contains the parts.

As *Judge Bradley* said, in the case of the *City of Norwich, 118 U. S., at p. 503:*

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfilment of his obligations. Personal arrest

and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or subject to seizure for contraband cargo or illegal trade; and it may even be called the 'guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property. It is true, that in *United States* vs. *Mason*, 6 Bissell, 350, it was held that in a proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him but against the goods. That decision, however, was disapproved by this Court in the case of *Boyd* vs. *United States*, 116 U. S., 616, 637, in which it is said: 'Nor can we assent to the proposition that the proceeding (*in rem*) is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great Judge, "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are." Vaughan, *C. J.*, in *Sheppard* vs. *Gosnold*, Vaughan, 159, 172; approved by Ch. Baron Parker in *Mitchell* vs. *Torup*, Parker, 227, 236.' "

## FOURTH POINT.

**The Courts below were right in holding that the Harter Act does not apply to passengers' baggage. (Eighth Assignment of Error.)**

The ticket in this case certainly does not fall within the words "bill of lading or shipping document," used in Sections 1, 2, and 4 of the Harter Act. These are expressions perfectly well understood in commerce, and apply

to bills of lading covering trade shipments, which are almost invariably insured. That Congress meant by the words "bill of lading or shipping document" but one thing, namely, bill of lading, appears from the language of Section 5, which provides a penalty for refusing to issue on demand "the bill of lading herein provided for," and does not mention the words "shipping document" at all.

On the other hand, for personal baggage accompanying the passenger no bill of lading or shipping document is, so far as we know, ever given. If the libellants had intended their personal baggage to fall within the provisions of the Harter Act, they could have accomplished it, as provided in the ticket itself, by declaring the value of the baggage over 250 francs, paying freight on the excess and getting a bill of lading. Not having done so, it remains baggage, and it does not lie in their mouths now to say that it is property or merchandise within the meaning of the Harter Act.

If the Harter Act did apply, there is nothing in it preventing the parties from agreeing upon the value of goods carried.

## FIFTH POINT.

### The Courts below were right in excluding testimony as to the amount of damage to the libellants' baggage. (Tenth Assignment of Error.)

It is the practice in the Federal courts of the Second Circuit, and, as we suppose, of all the other Circuits, to confine the testimony at the hearing of causes to the merits. All questions of amount of damage are, after the

decision on the merits, referred for ascertainment to commissioners appointed by the Court.

Upon the question whether the claimant in this case was liable to the libellants, the exact amount of damage which they sustained was perfectly irrelevant. If the claimant were held not liable, it would be mere loss of time to go into the particulars of the damage; if it were held liable, the proper tribunal for ascertaining the damage in the first instance would be a commissioner to be appointed by the Court.

## SIXTH POINT.

**The Courts below were right in holding that the receipt which the libellants received for their baggage was admissible in evidence. (Eleventh Assignment of Error.)**

It was a distinct document, part of the *res gesta*, and it showed that the company received the baggage subject to the conditions contained in its ticket and bill of lading. The reference to the bill of lading was in order to cover the case of passengers declaring the value of their baggage to be over two hundred and fifty francs and paying one per cent. as freight on the value in excess of that amount. It is perfectly consistent with the terms of the ticket. The company does not know the value of the baggage, but if it is carried under the ticket its agreed value is two hundred and fifty francs. If the passenger wishes to have it carried at a larger value he must declare the value over two hundred and fifty francs and pay freight thereon at the rate of one per cent. It is difficult to imagine a fairer arrangement.

## SEVENTH POINT.

**The admission of the deposition of Maurice de Cock was right, but any question about it on this appeal, is immaterial. (Twelfth and Thirteenth Assignments of Error.)**

The real object of this deposition was to show that the carrier was not liable to the libellants at all, because of certain clauses in the ticket exempting it from liability for its own negligence which were valid by the law of Belgium, where the contract was entered into, and subject to which law the contract was expressly made. But both the courts below decided against the claimant upon this point, and the claimant has not appealed. Therefore the admission of the deposition, even if erroneous, was harmless to the appellants and cannot be made a ground for reversing the decree of the court below.

It is true that the witness was also asked whether the clause limiting the amount of the carrier's liability was valid by and enforcible under the law of Belgium; but such a provision in the contract being consistent with our own public policy, the burden of showing that the law of Belgium is different lies upon the libellants, and therefore the claimant needs no proof on the subject at all.

HENRY GALBRAITH WARD,
Of Counsel for Claimant-Appellee.